SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. [redacted] 39

ENRIQUE PEREZ,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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TOPICAL INDEX

	Page
OPINION BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
The Defense To Count I	8
A. Alibi	8
Counts III and IV: Ralph's Bar and Eli Dragash	8
Count II: The Corner Market	11
Defense To Count II	13
A. Alibi	13
EVIDENCE OF A COLLATERAL CRIME NOT CHARGED IN THE INFORMATION	15
SUMMARY OF ARGUMENT	17
ARGUMENT	18
I. THE FIFTH AMENDMENT DOES NOT FORBID COMMENT BY COURT AND PROSECUTION WHERE A DEFENDANT ELECTS TO TESTIFY ON HIS OWN BEHALF BUT FAILS TO EXPLAIN RELEVANT EVIDENCE AGAINST HIM	18
(a) Waiver of the Privilege By Taking The Stand	18
(b) The California Waiver Rule	30
(c) Single Trial of Multiple Charges	33
II. ASSUMING A VIOLATION OF THE GRIFFIN RULE AS TO COUNTS III AND IV, THE ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT	35
CONCLUSION	38

TABLE OF AUTHORITIES CITED

CASES

Page

Adamson, v. California (1947), 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 ---------- 21

Anderson v. Nelson (Apr. 1, 1968), --- U.S. ---, 36 U.S.L.W. 3381 ---------- 35

Bloch v. United States, 261 F2d 321 (5th Cir. 1919) ---------- 24

Branch v. United States, 171 F.2d 337 (D.C. D.C. 1948) ---------- 24

Brown v. United States (1958), 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 ---------- 24, 27

Chapman v. California (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 ---------- 35, 36

Caminetti v. United States (1917), 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 ---------- 22–24, 26, 30

Carpenter v. United States, 264 F.2d 565 (4th Cir.1959) ---------- 25

DeRose v. United States, 315 F.2d 482 (9th Cir.1963) ---------- 24

Fontaine v. California, --- U.S. --- 36 L. Week 3389 (4-8-68) 35

Griffin v. California (1965), 380 U.S. 609, 85 S.Ct. 1229 14 L.Ed.2d 106 ---------- 18, 19, 20, 29, 33, 35, 37

Harrison v. United States --- U.S. ---, No. 876, O.T. 1967 (6-10-68) ---------- 24

Johnson v. New Jersey (1966), 384 U.S. 719, 86 S.Ct. 1772 16 L.Ed.2d 882 ---------- 37

Johnson v. United States (1943), 318 U.S. 189, 63 S.Ct. 549 87 L.Ed. 704 ---------- 24, 25, 31

Levinson v. United States, 5 F.2d 567 (6th Cir.1925) ---------- 24

Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489 12 L.Ed.2d 653 ---------- 19

Murphy v. Waterfront Commission (1964), 378 U.S. 52, 84 S.Ct. 1594 12 L.Ed.2d 678 ---------- 27

Ng Sing v. United States, 8 F.2d 919 (9th Cir.1926) ---------- 31

People v. Adamson, 27 Cal.2d 478, 165 P.2d 3 (1946) ---------- 21

People v. Arrighini (1898), 122 Cal. 121, 54 P. 591 ---------- 30

People v. Atchley (1959), 53 Cal.2d 160, 346 P.2d 764 ---------- 30

People v. Ing (1967), 65 Cal.2d 603, 422 P.2d 590 ---------- 30, 32

People v. Modesto (1965), 62 Cal.2d 436, 398 P.2d 753 ---------- 21

People v. O'Brien (1885), 66 Cal. 602, 6 P. 695 ---------- 30

People v. Perez (1967), 65 Cal.2d 615, 422 P.2d 597 ---1, 3, 33, 40

People v. Tarantino (1955), 45 Cal.2d 590, 290 P.2d 505 ---------- 31

People v. Withers (1946), 73 Cal.App.2d 58, 165 P.2d 945 ---------- 30

TABLE OF AUTHORITIES CITED—Continued

CASES—Continued

	Page
People v. Zerillo (1950), 36 Cal.2d 222, 223 P.2d 223	31
Powers v. United States (1912), 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448	24
Quinn v. United States (1955), 349 U.S. 155, 75 S.Ct. 668 99 L.Ed. 964	27
Ray v. United States 255 F.2d 473 (4th Cir.1958)	31
Redfield v. United States, 315 F.2d 76 (9th Cir.1963)	24
Sawyer v. United States (1906), 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972	24
Tehan v. Shott (1966), 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453	20, 37
Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed. 511 (1956)	27
United States v. Bradley, 152 F.2d 425 (3rd Cir. 1945)	31
United States v. Sahadi, 292 F.2d 565 (2nd Cir. 1961)	24
United States v. Van Den Berg, 129 F.2d 654 (7th Cir. 1944)	24
United States v. Walker Co., 152 F.2d 612 (3rd Cir. 1945)	24
Ziegler v. United States, 174 F.2d 439 (9th Cir. 1949)	24

CODES

California Penal Code, § 995	30
§ 1323	30, 31

CONSTITUTIONS

California Constitution, art. 1, § 13	21
United States Constitution, Fifth Amendment	2, 18, 19

MISCELLANEOUS

McBaine, Cal. Evidence Manual (1960) pp. 79–80	30
8 Wigmore Evidence, § 2251, pp. 295–318	29
§ 2263, pp. 378–379	27
§ 2276, p. 462	29, 33
Witkin, Cal. Evidence (1958) pp. 510–511	30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

NO. 1194

ENRIQUE PEREZ, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, *Respondent.*

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the California Supreme Court is reported as *People* v. *Perez,* 65 Cal.2d 615 [422 P.2d 597] (1967). This opinion reversed the opinion of the Court of Appeal of the State of California, Fifth Appellate District, which is reported in 51 Cal.Rptr. 11.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28 Sec. 1257(3) United States Code.

The judgment of the Supreme Court of the State of California was entered on January 27, 1967. A timely petition for a writ of certiorari was filed with this Court. A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 4, 1968. The case was assigned number 1194, October Term, 1967.

STATUTES INVOLVED

The pertinent statute and constitutional amendment are set forth in the Appendix hereto.

QUESTION PRESENTED

Does the Fifth Amendment forbid comment by court and prosecution where, as here, a defendant elects to testify on his own behalf but fails to explain relevant evidence against him?

STATEMENT OF THE CASE

On February 16, 1965, the District Attorney of Sacramento County filed in the Sacramento Superior Court an information charging petitioner Enrique Perez and one David Perez with four counts of armed robbery. Petitioner Enrique Perez was further charged with two prior felony convictions, both for first degree robbery (CT 7–10).

On February 25, 1965, the Public Defender was appointed to represent petitioner (CT 11).

On March 3, 1965, petitioner appeared for arraignment with defense counsel. He pleaded not guilty to

each of the four counts of robbery in the information. He also denied both prior convictions.

On March 11, 1965, Petitioner, through his counsel, moved under Penal Code section 995, in the Sacramento Superior Court to set aside Counts III and IV of the information. The Court denied the motion (CT 13). Petitioner was arraigned on two prior convictions, both of which he admitted (*Ibid.*).

On April 13, 14, 15, 16 and 19, 1965, petitioner, represented by counsel, was tried before a jury in the Sacramento County Superior Court (CT 15–18, 23).

On April 19, 1965, the jury returned verdicts of guilty against Enrique Perez on each of the four counts charged in the information (CT 19–23).

On May 19, 1965, the court denied probation to petitioner who was present with counsel, as well as his motion for a new trial (CT 26), and entered judgment of conviction (CT 24). The court sentenced petitioner to the California State Prison for the term prescribed by law, the sentences to run consecutively as to Counts I and II, concurrently as to Counts III and IV (CT 25). The judgment was reversed by the Court of Appeal of the State of California, Fifth Appellate District. That court's opinion was vacated and the judgment affirmed by the California Supreme Court in *People* v. *Perez,* 65 Cal.2d 615 [55 Cal.Rptr. 909, 422 P.2d 597] (1967).

The facts are as follows:

Count I: The Viking Club Robbery

Count I concerns the robbery by two men (RT 24) of the Viking Club, 1445 33rd Street, Sacramento (RT 23).

Frederick Harold Fauble was working at the Viking Club when the robbery occurred about 9:00 p.m. on the night of January 3, 1965 (RT 23).

The two robbers were approximately the same size (RT 24): about 5'6" or shorter with light builds (RT 30).

One of the robbers was dark complexioned (RT 24) with dark, slightly wavy hair (RT 25, 30, 32). This dark complexioned, dark haired robber wore a dark colored windbreaker jacket (RT 25, 40), and was armed (RT 24) with a small caliber automatic pistol (People's Exhibit 3, RT 26, 35). He wore a glove on one hand (RT 35), and held a wrist length black leather glove over his mouth (RT 24).

The other robber was blond haired (RT 24, 25), and light complexioned (RT 30). Fauble could not recall whether the blond haired robber was armed (RT 26).

The dark complexioned robber held a gun on Fauble and ordered him to "Come out from behind the bar, lay down on the floor" (RT 27). Fauble could hear the two robbers "go behind the counter and get into the cash register" (RT 28). Then the robbers tied up Fauble and "proceeded to go through the bar" (RT 28).

The robbers again returned to Fauble, this time blindfolding him and moving him to the storage room

in the back part of the bar where he was again told to lie down (RT 28, 29–30). Fauble could hear the robbers nearby "taking things off the shelf" (RT 28). Some of the shelved things the robbers were rustling through "were falling all around me as I was laying there" (RT 28).

Fauble heard some "cigar boxes knocked off the shelf" by the robbers (RT 28). One of these was a Roi Tan cigar box (People's Exhibit 22) from which three fingerprints were lifted (People's Exhibits 23 A and B) (RT 115–116). Two of the fingerprints were identifiable: one was the right thumb of petitioner, the other was from petitioner's right middle finger (RT 122, 123).

The loot taken from the Viking Club and Frederick H. Fauble, through use of force and fear (RT 29), consisted of approximately $325 in cash, a Shell credit card, and a BankAmericard (RT 26). Fauble's BankAmericard bore serial number 130625825 (RT 26).

After he heard the robbers leave, Fauble got himself loose in about 10 or 15 seconds (RT 28, 35–36) and saw what he believed to be a Ford station wagon drive by on the street in front of the victimized Viking Club (RT 31, 36, 37). The driver of the station wagon resembled the dark complexioned robber (RT 36, 38, 39).

Petitioner by his testimony admitted that he had made about 10 purchases on the stolen BankAmericard over a week's time (RT 412, 415, 417). Petitioner admitted that when he used the stolen BankAmeri-

card that he signed the name of "Fred Fauble" (RT 412, 415) to the sales drafts.

Among the purchases made on the stolen BankAmericard beginning the day after the robbery were the following:

1. On January 4, 1965, Frederick Fauble's stolen BankAmericard was used at Stan's Men's Store in Woodland, California. The salesman distinctly remembered petitioner making the purchase and using the BankAmericard (RT 42). Although he was not certain, the salesman thought petitioner had purchased a Pendleton shirt and some socks (RT 42, 61–62).

2. On January 4, 1965, Frederick Fauble's stolen BankAmericard was used to purchase a $24.95 watch from the Ben Franklin Store, Davis, California (RT 95). Petitioner "looks like one of the two" men who made this purchase (RT 98).

3. On January 4, 1965, Frederick H. Fauble's stolen BankAmericard was used at IXL, Inc., 804 "J" Street, Sacramento (RT 139), to purchase a pair of black imitation leather gloves similar to People's Exhibit 10 (RT 141, 144). Salesman, Jim Bell, recalled having seen petitioner in the IXL store (RT 142). Petitioner admitted that he has a pair of black gloves like People's Exhibit 10 (RT 442). These gloves were worn by petitioner in the Corner Market holdup (Count 2) (RT 149, 150).

4. On January 4, 5, or 6, 1965 (RT 76–77) Fauble's stolen BankAmericard was used at Devlin's Shoe Den, 1007 11th Street, Sacramento (RT 71), to purchase

the pair of shoes which petitioner was wearing in court at the time of the trial (RT 74). Petitioner admitted having made this purchase on the stolen BankAmericard (RT 412).

5. On January 5 and 7, 1965, the stolen BankAmericard was used to make purchases at two different Shell service stations (RT 102, 106–107, 134), in the Sacramento area for a vehicle bearing license number LDT 141 (RT 102, 127). A 1950 Willys station wagon with license number LDT 141 was registered to petitioner. Petitioner admitted buying gasoline for his Willys station wagon, license number LDT 141, by use of Frederick Fauble's stolen BankAmericard (RT 413, 445).

6. On January 7, 1965, a black, narrow-brimmed hat (People's Exhibit 8; RT 15) was bought from Jim Patterson's Men's Store, 9th and "K", Sacramento (RT 89, 91, 92), by use of Frederick Fauble's stolen BankAmericard. While witness Jim H. Patterson did not recall the particular hat sale (RT 92, 94), the hat was identified as merchandise from Jim Patterson's Men's Store from the label and price tag which were still in the hat at the time of the trial (RT 91–92). Patterson also recognized his handwriting on the sale's slip (RT 90, 93). Petitioner admitted he (RT 413) used the stolen BankAmericard to purchase the hat at the Jim Patterson Store. People's Exhibit 8 was the type of dark, narrow-brimmed hat which petitioner wore when he robbed the Corner Market (Count II) (RT 150, 187).

THE DEFENSE TO COUNT I

A. Alibi

Petitioner took the stand in his own defense (RT 411). He denied having been to the Viking Club on the night of the robbery, January 3, 1965 (RT 424). Petitioner said he had been with his brother Miguel and a friend Joseph Rosales between 7:30 p.m., January 3, and 1:00 a.m. on January 4. Petitioner's testimony was supported by testimony of Mrs. Joseph Rosales (RT 323–325) and petitioner's brother Miguel Perez (RT 335, 337).

Petitioner testified that he had been given Frederick H. Fauble's BankAmericard "in early January" from one Robert Gomes who had originally tried to sell the card to Perez (RT 416, 417, 445).

COUNTS III AND IV: RALPH'S BAR AND ELI DRAGASH

On the night of January 13, 1965, at 1:15 a.m., three men held up Ralph's Bar, 1730 16th Street, Sacramento. The robbers took, by force and fear (RT 49) "everything out of the cash register, all the coins and cash" (RT 47) from Ralph's Bar and $6.00 from Eli Dragash, a customer in the victimized bar (RT 58).

The robbers were one large man with a "large football type of physique" and two smaller men (RT 46).

The larger robber with the football player physique was one David Perez (RT 47–48) who pleaded guilty

to both the robberies of "Ralph's Market [sic] and the Corner Market [Count II]" (RT 204).

David was wearing a white Halloween mask over the lower part of his face (RT 49, 52–53). He ordered bartender, Biner, to come out from behind the bar (RT 53). Biner and the two customers were taken to the north end of the room where they were made to lie on the floor (RT 51). David went behind the bar and moved some cigar boxes from near the cash register in the process of getting at the money (RT 54, 55).

Neither bartender Biner, nor customer-robbery victim, Eli Dragash was in a position to get a look at the faces of the two shorter robbers (RT 46–47, 57–58).

One of the smaller robbers wore a tan three-quarter length trench coat (People's Exhibit 5; RT 46, 47, 50, 58, 59). This robber was about 5'7" in height (RT 50–51), and wore besides his rain coat, a hat and a handkerchief mask (RT 58–59). He carried "a .38 caliber revolver with a six-inch barrel" (RT 59).

Petitioner was seen with confessed robber David Perez and one Joe Jordan about 1:00 or 1:30 a.m. on January 13, 1965 (RT 204) at Sylvia Moreno's apartment, 2117 15th Street, Sacramento. This was either just before or just after the Ralph's Bar holdup and only about three blocks from the scene of the crime (RT 203). The three men, who "didn't stay too long", left Sylvia Moreno's apartment together (RT 205).

Two days after the Ralph's Bar holdup and following the Corner Market holdup (Count II) the Sacramento police took from Sylvia Moreno's apartment the weapons and disguises used and some of the loot taken in the robberies for which petitioner was on trial (RT 9–21). This evidence collected from Sylvia Moreno's apartment included:

The .32 caliber revolver with a hexagonal barrel (People's Exhibit 2; RT 11) used by petitioner in the Corner Market holdup (RT 151, 152, 198).

The Beretta .22 automatic pistol (People's Exhibit 3; RT 12) used in the Viking Club robbery (RT 26, 35) and by David at the Corner Market robbery (RT 152).

A tan or off-white raincoat (People's Exhibit 5; RT 13–14) used in the Ralph's Bar robbery (RT 47), and the Modern Variety Store holdup (RT 246, 256).

A black raincoat (People's Exhibit 6; RT 14) worn by petitioner in the Corner Market (RT 149–150, 187), and Modern Variety Store (RT 246, 256) robberies, and acknowledged as belonging to petitioner (RT 373, 375, 389, 437, 438).

A black narrow-brimmed hat (People's Exhibit 8; RT 15), purchased by petitioner on Fred Fauble's stolen BankAmericard at Jim Patterson's Men's Store (RT 89, 91, 92) and worn by petitioner in the Corner Market holdup (RT 149–150, 187).

The right glove of a pair of black imitation leather gloves (RT 16, 21).[1]

[1] The left glove of this pair was found in the automobile in which petitioner was riding with David Perez and Joe Jordan at the time of their arrest (RT 16, 21).

A radio (People's Exhibit 1; RT 10) which petitioner himself robbed from the Corner Market (RT 156, 182–183, 186).

COUNT II: THE CORNER MARKET

Two nights after the robbery of Ralph's Bar, petitioner and David held up the Corner Market, 1700 "V" Street, Sacramento. This robbery occurred at about 7:00 p.m. on the evening of January 15, 1965 (RT 148, 185). The victim-witnesses were James Monahan, store owner, and his wife.

David was the heavy set robber (RT 149), armed with an automatic pistol (People's Exhibit 3; RT 152) who confessed to this robbery (RT 204) and the holdup of Ralph's Bar.

Petitioner, the smaller robber with a lighter build (RT 149) carried a revolver with an "odd looking", "hexagonal" barrel (People's Exhibit 2; RT 151, 152, 198).

Both robbers wore dark coats (People's Exhibit 6) and black gloves, probably leather (People's Exhibits 9A, 9B and 10) (RT 149, 150, 187). Both robbers wore dark narrow-brimmed hats of the same type (People's Exhibit 8) (RT 150, 187). They wore dark pants, similar to People's Exhibit 7 (RT 150–151, 187).

Each robber held what appeared to be a glove or cloth (RT 170, 171–172, 174) or handkerchief (RT 178) up to his face so that his nose and mouth were

covered (RT 170, 178, 193). Petitioner had his hat pulled down to his eyebrows (RT 179).

Petitioner went right to the counter with gun in hand and said, "This is a stick-up" (RT 163–164). He made Mrs. Monahan put all the cash register money in a paper bag. Mr. Monahan was made to hand over his wallet which contained 14 to 17 dollars (RT 165, 186). The Monahans testified, "He told us to drop our hands and not make a move, or not to look at him or he would kill us" (RT 167, 179, 190).

Just before petitioner walked behind the counter to search for more loot, he momentarily dropped the glove or cloth held in front of his face (RT 189). Mrs. Monahan was right across the counter from petitioner and got a clear view of his face (RT 189). When petitioner walked behind the counter and reached for a radio that the Monahans kept there, he again dropped the covering from his face (RT 179). At this time Mr. Monahan got a momentary look at petitioner's face (RT 179–180).

Petitioner took Mrs. Monahan's radio from the counter beneath the cash register (RT 156, 182–183, 186), and left the victimized store with his partner, David (RT 167, 182–183, 186). Besides the radio (People's Exhibit 1) (RT 156, 186), the robbers took, by force and fear, $69.00 in cash from The Corner Market (RT 156, 185).

Each of the Monahans, in open court, identified petitioner as the shorter of the two robbers who held them up, and as the only robber of whom they got a

full face view (RT 154, 169, 186–187). Mrs. Monahan testified that when petitioner robbed The Corner Market he was dressed in dark clothes including a black narrow-brimmed hat (People's Exhibit 8), a pair of black gloves similar to People's Exhibit 10, and a coat (People's Exhibit 6) (RT 187).

Each of the Monahans separately (RT 199) identified petitioner out of a police line-up (RT 155, 191). At the time of the police line-up there was some doubt in Mrs. Monahan's mind as to whether petitioner was one of the robbers of The Corner Market (RT 195, 196). Mrs. Monahan asked to see the suspect with a hat on because that was the way she had viewed the robber (RT 192). After Mrs. Monahan saw petitioner with a hat on she had no doubt as to the identity of petitioner as one of the robbers (RT 200, 201). At the time of her testimony, Mrs. Monahan had no doubt that petitioner was one of the robbers (RT 200).

DEFENSE TO COUNT II

A. Alibi

Petitioner sought to establish the alibi that he was at his home from about 6:00 p.m. until about 8:30 p.m. on the night of Friday, January 15, 1965, when The Corner Market was robbed at 7:00 p.m.

Petitioner took the witness stand in his own behalf and testified that he arrived home about 6:00 p.m. on January 15th, and that he was there until he left with David Perez and Joe Jordan between 8:30 and 9:00

p.m. (RT 426, 427). Petitioner testified that David and Joe had come to petitioner's home about 7:45 p.m., had entered the house, and stayed about a half hour before the three men left together shortly before they were arrested (RT 426, 427).

Petitioner was impeached by a prior felony conviction when he testified that in 1962 he pleaded guilty to an armed robbery and was sent to the Youth Authority (RT 452, 453).

In support of petitioner's alibi, two witnesses, petitioner's brother and mother, told somewhat inconsistent stories.

Miguel, petitioner's brother, testified that petitioner was home for dinner on January 15, around 6:00 or 6:30 p.m. About 6:45 p.m., Miguel left the Perez home for about one half hour to go to the store (RT 339, 340). Petitioner Enrique Perez was said to have been home both when Miguel left and returned from his errand (RT 341). David Perez and Joe Jordan were not at Enrique Perez's home when Miguel left at 6:45 p.m. (RT 340). Miguel did not recall when David and Joe arrived at the Enrique Perez home (RT 342). They arrived "somewhere between 7:30 and 8:00" (RT 339) because they were at the Perez (RT 341–342) residence when Miguel returned "close to 7:00, 6:45, quarter to seven" (RT 340) or "Seven-thirty. I don't know. About 7:00, 7:30, somewhere like that" (RT 342). When Miguel returned home "he [petitioner] was getting dressed

along with Jordan and David Perez . . . . They were just talking while he was getting dressed, ..." (RT 342).

Petitioner's mother, Mrs. Librada Perez testified that her son, Enrique Perez, arrived home about 5:00 or 5:30 p.m. (RT 362) and was at home the entire period from his arrival "until he left the house just before he was arrested" (RT 363). Mrs. Perez was home the entire time from 5:00 o'clock until Henry left the house (RT 363). Mrs. Perez testified that none of Enrique's friends came inside the house on the night of the arrest (RT 363, 366). According to Mrs. Perez, petitioner left the house to meet some friends who came by to pick him up and were waiting outside (RT 363). Mrs. Perez was watching television in the living room (RT 366), and saw her son, petitioner Enrique Perez, "going out the front door that night" (RT 367).

EVIDENCE OF A COLLATERAL CRIME NOT CHARGED IN THE INFORMATION

Evidence was admitted (RT 245) of a robbery of the Modern Variety Store, 23rd and "F" Streets, Sacramento at 6:45 or 6:50 p.m., on the night of November 10, 1965. In the instant case, petitioner is not charged with this crime. Evidence of the Modern Variety Store robbery was admitted for the limited purpose of establishing the identity of petitioner as a perpetrator of the counts charged through evidence of a similar modus operandi (RT 243, 244, 245, 530–531).

William E. George, owner and operator of the Modern Variety Store was the victim (RT 245-257).

Both robbers were white men (RT 247). Both wore stocking masks which covered their faces and heads (RT 247, 255). Neither man was recognizable (RT 255). The taller robber was about 5'9", the shorter robber was about 5'6" or 5'7" in height (RT 246, 254). Both robbers wore trench coats. The taller robber's coat was tan or beige (People's Exhibit 5). The shorter robber wore a black trench coat (People's Exhibit 6) (RT 246, 256).

The taller robber was armed with a sawed-off .22 rifle (RT 257) (People's Exhibit 26) (RT 250, 257). Mr. George saw no weapon on the shorter robber (RT 257.)

The taller robber entered the store first with his shorter partner directly behind him. The tall man went to the front of the counter and motioned Mr. George to stand back. The shorter robber went behind the counter where Mr. George was standing (RT 250, 257). At the tall robber's order, Mr. George opened the cash register. The short robber took the currency from the cash register and probably also took a few silver dollars. After looking under the money tray and finding nothing, the short robber tried to pull up the stationary dividers in the cash register. Mr. George told him they were not removable (RT 251).

Then the tall robber asked his victim, "where's the money orders?" Mr. George pointed down to them.

The short robber picked up the blank money orders after initially having grabbed some utility bill stubs. The taller robber picked up the check protector, and the two robbers departed from the victimized store (RT 252).

The loot from the Modern Variety Store robbery consisted of a check protector People's Exhibit 27; RT 249, 250), a block of blank money orders (People's Exhibit 28; RT 249, 250) and cash (RT 251). The check protector was needed to make the blank money orders negotiable (RT 252).

Petitioner and a man named Hunt went to the home of Richard Bostic in San Francisco and left the .22 rifle used in the Modern Variety Store robbery (People's Exhibit 26) along with the stolen check protector and money orders (People's Exhibits 27 and 28) (RT 259, 260).

At the time the weapon and loot of the Modern Variety Store robbery were left with Bostic, petitioner confessed to Bostic that the items had been acquired in a holdup in Sacramento that very day (RT 261–262, 264–265). The San Francisco police took the rifle, check protector, and money orders from Bostic about one day after petitioner and Hunt had delivered them (RT 265, 266).

SUMMARY OF ARGUMENT

Where a defendant elects to testify in his own behalf but fails to explain relevant evidence against him neither the Fifth Amendment nor the rule in

Griffin v. *California* prohibits comment on his failure to deny or explain the evidence against him.

Petitioner, by testifying in his own behalf, waived his constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination. Since the offenses charged in Counts III and IV, as well as the collateral offense, were relevant to show a common scheme or plan, cross-examination as to these offenses was proper. Moreover, the joinder of the four counts of robbery for trial was proper and did not prejudice petitioner.

Even if it be assumed there was a violation of the *Griffin* rule as to Counts III and IV, nevertheless the error was harmless beyond a reasonable doubt.

ARGUMENT

I. The Fifth Amendment Does Not Forbid Comment by Court and Prosecution Where a Defendant Elects to Testify on His Own Behalf But Fails to Explain Relevant Evidence Against Him

(A) WAIVER OF THE PRIVILEGE BY TAKING THE STAND

Petitioner took the stand in his own behalf and gave alibi testimony with respect to the robberies charged in Counts I and II. He did not testify on direct examination to the robberies charged in Count III and IV or to the collateral robberies. On cross-examination the prosecution asked a question relating to the robberies charged in Counts III and IV. An objection was sustained on the ground that the question was beyond the scope of direct examination.[2] In argument

[2] The California Supreme Court held that this restriction on cross-examination was improper.

to the jury the prosecution commented on petitioner's failure to explain or deny the evidence against him as to Counts III an IV. The trial court gave instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge.[3]

It is respondent's position that it was not a violation of the Fifth Amendment privilege against self-incrimination for the prosecutor to argue and the court to instruct the jury that an inference unfavorable to the petitioner could be drawn from his failure to explain or deny facts within his knowledge relating to Counts III and IV and to the collateral offense established by the evidence.

In *Malloy* v. *Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 84 S.Ct. 1489 (1964), this Court applied the Fifth Amendment's injunction that no person "shall be compelled in any criminal case to be a witness against himself" to the states through the provisions of the Fourteenth Amendment. It further held that the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.

Subsequently, in *Griffin* v. *California,* 380 U.S. 609, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965), the Court specifically held that California's comment provision was a violation of the privilege against self-incrimination *in the case of a defendant who did not choose to take the stand and testify.* This Court reasoned that com-

[3] See Appendix A, attached.

ment on the refusal to testify was a penalty imposed for exercising a constitutional privilege inasmuch as it cut down on the privilege by making its assertion costly. The Court then forbade either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt in such a situation.

In *Tehan* v. *Shott*, 382 U.S. 406, 15 L.Ed.2d 453, 86 S.Ct. 459 (1966), this Court limited the applicability of the *Griffin* decision to those cases in which the judgment had not yet become final (i.e., the availability of appeal exhausted and the time for petition for certiorari elapsed or petition for certiorari denied) [4] prior to April 28, 1965. In limiting the retroactivity the Court evaluated the reasons for holding impermissible comment by a judge or prosecutor upon a defendant's failure to testify, among which were (1) preservation of the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load"; (2) that all states had by their own laws respected the basic purposes of the Fifth Amendment but in varying forms; (3) the Constitution's basic concern was for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life.

In *Griffin*, the defendant did not take the stand. In the instant case, the petitioner did take the stand. It

[4] Petitioner's direct appeal was pending on the date Griffin was decided and Griffin is therefore applicable.

was not for a limited purpose such as challenging the validity of the foundation for the introduction of a confession or refuting the legality of obtaining evidence but to present an affirmative defense as to certain portions of the charge against him. By so doing, it is submitted he has relinquished his "right to a private enclave where he may lead a private life."

As applied to this situation, California's comment rule (art. 1, § 13, California Constitution) should validly apply. Article 1, Section 13 provides in part:

> ". . . in any criminal case, *whether the defendant testified or not,* his failure to explain or to deny his testimony any evidence or facts against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ." (Emphasis added) [5]

The right of comment is limited and the limitations were explained to the jury in the instructions given (*People* v. *Adamson,* 27 Cal.2d 478 [165 P.2d 3] (1946); *Adamson* v. *California,* 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947); *People* v. *Modesto,* 62 Cal. 2d 436 [398 P.2d 753] 1965; Appendix A). Although this Court has struck down the provision of the California Constitution with relation to the comment and instruction as to a nontestifying-defendant, nowhere in its opinions has the Court intimated that it intended to pass upon the validity of that portion of the constitutional provision in question which permits comment by the prosecution once the defendant chooses

[5] See Appendix C.

to take the stand but fails to explain the evidence against him.

Both the state and federal cases have recognized that the privilege against self-incrimination is one that may be waived. The landmark case on the subject of the waiver of the privilege by electing to testify is *Caminetti* v. *United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917). It was there held that an accused who takes the stand and voluntarily testifies in his own defense may not stop short in his testimony by failing to explain incriminating circumstances already in evidence in which he participated and concerning which he is fully informed without subjecting his silence to the inferences naturally to be drawn from it and justifying comment by the court in its instruction that the jury may take such omission into consideration in reaching a verdict. The reasoning of the court in *Caminetti* and the scope of the waiver were stated in the following language:

> "We think the better reasoning supports the view sustained in the court of appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself (Act of March 16, 1878, 20 Stat. at L. 30, chap. 37, Comp. Stat. 1913, § 1465), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

"The accused, of all persons, had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest, and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him. The instruction to the jury concerning the failure of the accused to explain acts of an incriminating nature which the evidence for the prosecution tended to establish against him, and the inference to be drawn from his silence, must be read in connection with the statement made in this part of the charge which clearly shows that the court was speaking with reference to the defendant's silence as to the trip to Reno with the girls named in the indictment, and as to the facts, circumstances, and intent with which that trip was taken; and the jury was told that it had a right to take into consideration that omission.

"The court did not put upon the defendant the burden of explaining every inculpatory fact shown or claimed to be established by the prosecution. The inference was to be drawn from the failure of the accused to meet evidence as to these matters within his own knowledge and as to events in which he was an active participant and fully able to speak when he voluntarily took the stand in his

> own behalf. We agree with the circuit court of appeals that it was the privilege of the trial court to call the attention of the jury in such manner as it did to this omission of the accused when he took the stand in his own behalf." (61 L.Ed. at pp. 456–457.)

Since the *Caminetti* decision the federal courts have closely followed the principles established in that case. See *Redfield* v. *United States,* 315 F.2d 76 (9th Cir. 1963); *United States* v. *Sahadi,* 292 F.2d 565, 586 (2d Cir. 1961); *United States* v. *Walker,* 152 F.2d 612 (3rd Cir. 1945); *United States* v. *Van Den Berg,* 139 F.2d 654, 656 (7th Cir. 1934); *Levinson* v. *United States,* 5 F.2d 567, 569 (6th Cir. 1925); *Bloch* v. *United States,* 261 F. 321 (5th Cir. 1919). The general trend of the federal cases is that the waiver by an accused who takes the stand in his own behalf "is determined by the scope of relevant cross-examination" (*Harrison* v. *United States,* ___ U.S. ___, No. 876 O.T. 1967 (June 10, 1968); *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); *Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); *Powers* v. *United States,* 223 U.S. 303, 32 S.Ct. 281, 56 L.Ed. 448 (1912); *Sawyer* v. *United States,* 202 U.S. 150, 26 S.Ct. 575, 50 L.Ed. 972 (1906); *Ziegler* v. *United States,* 174 F.2d 439 (9th Cir. 1949); *Branch* v. *United States,* 171 F.2d 337 (D.C. D.C. 1948); *DeRose* v. *United States,* 315 F.2d 482 (9th Cir. 1963)).

The waiver is not limited by the fact that the defendant's answer on cross-examination might tend to establish his guilt of a collateral offense for which he could still be prosecuted (*Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704 (1943); *Carpenter* v. *United States,* 264 F.2d 565 (4th Cir. 1959)). In the *Carpenter* case the defendant was convicted on all counts of indictments charging him with the interstate transportation of three kidnapped persons and two stolen automobiles.

The charges against defendant arose out of a series of events which started with a shooting in a bar. After the shooting the defendant and his accomplice attempted to escape. During the attempted escape the people were kidnapped and the cars stolen.

The defendant took the stand and testified about all relevant events except what had occurred in the bar. On cross the prosecutor attempted to ask him about the shooting in the bar. The defense objected on the ground that this inquiry was beyond the scope of the direct. The court ruled that this was proper cross and the defendant then refused to answer the questions on the ground that he had been indicted elsewhere for the bar shooting and his answers to the prosecutor's questions would incriminate him. The court ordered him to answer, and when he refused, cited him for contempt. The court instructed the jury that it could consider the fact that defendant refused to answer these questions as evidence against him.

The court held that "it matters not that the defendant's claim is that his anwers to the line of inquiry would tend to establish his guilt of homicide for the commission of which he was then under indictment, but not on trial. So long as the inquiry was relevant to the issue in the case then being tried and the answers were within his knowledge, the inquiry was within the compass of the waiver of his privilege when he voluntarily became a witness, and his refusal to answer became a proper subject of comment and consideration."

A consideration of the history and the policy of the Fifth Amendment privilege leads to the conclusion that the principles concerning the waiver of it announced in the *Caminetti* case and others cited herein do not impair the exercise of this privilege. It should first be noted that the phrasing of the constitutional privilege is that no person "shall be compelled in any criminal case to be a witness against himself." Logically, this phraseology does not encompass a sitution where a person accused of crime voluntarily takes the stand. Wigmore points out that:

> "The *history* of the privilege (§2250 *supra*)—especially the spirit of the struggle by which its establishment came about—suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence. That is, it was intended to prevent the use of legal compulsion to extract from the person

> a sworn communication of his knowledge of facts which would incriminate him. Such was the process of the ecclesiastical court, as opposed through two centuries—the inquisitorial method of putting the accused upon his oath in order to supply the lack of the required two witnesses. Such was the complaint of Lilburn and his fellow objectors, that he ought to be convicted by other evidence and not by his own forced confession upon oath." (Wigmore on Evidence, § 2263, pp. 378–379.)

See *Quinn* v. *United States,* 349 U.S. 155, 75 S.Ct. 668, 99 L.Ed.2d 964 (1955); *Ullmann* v. *United States,* 350 U.S. 422, 76 S.Ct. 497, 100 L.Ed.2d 511 (1956); *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964).

On the subject of the safeguards of the privilege, this Court used the following language in *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958):

> "Our problem is illumined by the situation of a defendant in a criminal case. If he takes the stand and testifies in his own defense, his credibility may be impeached and his testimony assailed like that of any other witness, and the breadth of his waiver is determined by the scope of relevant cross-examination. '[H]e has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.' *Fitzpatrick* v. *United States,* 178 U.S. 304, 315, 44 L.Ed. 1078, 1083, 20 S.Ct. 944; and see *Reagan* v. *United States,* 157 U.S. 301, 304, 305, 39 L.Ed. 709–711, 15 S.Ct. 610. The

reasoning of these cases applies to a witness in any proceeding who voluntarily takes the stand and offers testimony in his own behalf. It is reasoning that controls the result of the case before us.

". . . .

"On the other hand, when a witness voluntarily testifies, the privilege against self-incrimination is amply respected without need of accepting testimony freed from the antiseptic test of the adversary process. The witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry. Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness, not to testify at all. He cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell. '[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' *Walder* v. *United States,* 347 U.S. 62, 65, 98 L.Ed. 503, 507, 74 S.Ct. 354. The interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination. [Footnote omitted.] Petitioner, as a party to

> the suit, was a voluntary witness. She could not take the stand to testify in her own behalf and also claim the right to be free from cross-examination on matters raised by her own testimony on direct examination." (2 L.Ed.2d at pp. 596–597.)

The policies behind the adoption of this rule are detailed in the *Griffin* opinion (*Griffin* v. *California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965)) at 380 U.S. 615. In *Griffin,* the court states that the Fifth Amendment was framed with a due regard for those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and who do not wish to be witnesses. The court points out that it is not everyone, however honest, who would, therefore, willingly be placed on the witness stand. The Fifth Amendment in tenderness to the weakness of those who might refuse to ask to be a witness, particularly when they may have been in some degree compromised by their association with others, declares that the *failure* of the defendant in a criminal action *to request to be a witness* shall not create any presumption against him.

These reasons for forbidding comment upon the exercise of the defendant privilege have little relevance once the accused takes the stand and testifies. Moreover, the other arguments advanced in support of the privilege against self-incrimination also lose their force once the defendant decides to accept the advantages of testifying in his own defense. 8 Wigmore, *Evidence,* § 2276, p. 462; § 2251, pp. 295–318

(McNaughton Rev. 1961). To permit a defendant, who has waived his defendant privilege and elected to take the stand, to testify solely to those aspects of his case which are favorable to his cause without giving the prosecution the chance to explain, not only does not advance the purposes of the privilege, but it so distorts the trial picture presented to the jury that the balance of fairness is unconscionably tipped in favor of the defendant. Therefore, the overwhelming majority of both federal and state courts have adopted the rule that once the defendant waives his defendant privilege by taking the stand and testifying to matters relevant to the charge against him, the no-comment rule is no longer applicable.

(B) THE CALIFORNIA WAIVER RULE

California follows the general rules established in *Caminetti* and subsequent federal cases. In *People* v. *Ing,* 65 Cal.2d 603 [422 P.2d 590] (1967), decided the same day as the present case, the California Supreme Court held that a defendant, by testifying in his own behalf, waives his constitutional privilege against self-incrimination to the extent of the permissible scope of cross-examination (Pen. Code § 1323; *People* v. *Atchley,* 53 Cal.2d 160, 173–174 [346 P.2d 764] (1959); *People* v. *Arrighini,* 122 Cal. 121, 126 [54 P. 591] (1898); *People* v. *O'Brien,* 66 Cal. 602, 603 [6 P. 695] (1885); *People* v. *Withers,* 73 Cal.App. 2d 58, 60–61 [165 P.2d 945] (1946); see Witkin, Cal. Evidence (1958) pp. 510–511; McBaine, Cal. Evidence

Manual (1960) pp. 79–80.) Under California provisions cross-examination of a defendant is limited to "matters about which he was examined in chief" (Pen. Code § 1323).[6]

The factual matters in the present case relating to Counts III and IV and the collateral offense (Modern Variety Store robbery) were within the scope of permissible cross-examination. Where, as here, the petitioner takes the stand and in effect makes a general denial of the offenses charged in Counts I and II, the scope of cross-examination is very broad (*People* v. *Tarantino,* 45 Cal.2d 590 [290 P.2d 505] (1955); *People* v. *Zerillo,* 36 Cal.2d 222 [223 P.2d 223] (1950). The offenses charged in Counts III and IV and the collateral offense were relevant to show a common scheme or plan and would thus rebut petitioner's alibi testimony as to Counts I and II. Cross-examination as to these offenses would have been proper[7] (*Johnson* v. *United States,* 318 U.S. 189, 191, 195–196 (1943); *Ray* v. *United States,* 255 F.2d 473, 475 (4th Cir. 1958); *United States* v. *Bradley,* 152 F.2d 425, 426 (3rd Cir. 1945); *Ng Sing* v. *United States,* 8 F.2d 919, 920 (9th. Cir. 1926)).

In the *Tarantino* case, the defendant testified that he did not commit the crimes charged. The prosecution cross-examined the defendant as to other similar of-

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[6] See Appendix B attached.

[7] The trial court erroneously sustained an objection to cross-examination of petitioner directed to Counts III and IV upon the ground that the questions were beyond the scope of direct examination. No prejudice resulted since petitioner was the beneficiary of the error.

fenses to which he had not referred to in his testimony in chief. In rejecting a contention that this cross-examination was improper, the California Supreme Court stated: "The cross-examination here was directed primarily to matters implicit in Tarantino's general denial, i.e., his purpose, and motive, his general plan and scheme."

The reasoning of the California Supreme Court on this issue is as follows:

> "As we have seen, on direct examination defendant testified to an alibi with respect to counts 1 and 2 and thus in effect denied the offenses charged in those counts. Cross-examination as to the collateral offense, which disclosed a plan, pattern, and *modus operandi* similar in many respects to those charged, would have been proper. (*People* v. *Ing, supra, ante,* p. 612, and authorities cited therein.) Cross-examination as to the robberies charged in counts 3 and 4 likewise would have been proper. Those robberies, like the collateral robbery, disclosed a plan, pattern, and *modus operandi* similar in many respects to those charged in counts 1 and 2.
>
> "The fact that defendant was then on trial for the robberies charged in counts 3 and 4 does not preclude a determination that the waiver extends to those offenses. To hold otherwise would permit a defendant to withdraw from the crossfire of interrogation before the reliability of his testimony has been fully tested. It is also of importance that the reasons advanced for the privilege are decisively less persuasive when applied to disclosures requested after the accused has voluntarily taken

the stand. (See 8 Wigmore on Evidence (McNaughton rev. 1961) § 2276, p. 462.)" (*People* v. *Perez,* 65 Cal. 2d 615, at p. 621 [422 P.2d 597] (1967).)

(C) SINGLE TRIAL OF MULTIPLE CHARGES

Petitioner argues that if he were tried separately for each of these crimes he could pick and choose which crimes he wanted to testify to, and if he should choose not to take the stand with regard to a particular crime, no comment could be made upon his failure to testify. Thus, the argument continues, the prosecution is able to use a procedural device to strip from petitioner one of his basic constitutional rights. This argument is without merit.

Petitioner is correct in his assertion that if he were tried separately for each crime, he could selectively assert his right to take the witness stand and no comment could be made on his failure to take the stand under *Griffin* v. *California,* 380 U.S. 609 (1965). However, if petitioner were to choose in any single case not to testify, he would not have the important psychological advantage of having taken the stand which he had in the present case. Having elected not to testify at all, the jury would still be able to draw the natural inferences that it would normally draw even though no comment is made upon the defendant's failure to take the stand. Moreover, if the defendant chose not to take the stand, no confusion would arise in the minds of the jury as to why he did not discuss and was not cross-examined on critical evidence which was

introduced against him. In the present case, petitioner did take the stand and was thereby able to favorably impress the jury with his willingness to testify. To permit the defendant to gain this advantage, without allowing the People to comment not only on what he said but what he failed to say, gives the defendant an advantage he would not have in separate trials and which, in fairness to the prosecution, he should not be allowed to have.

Furthermore, petitioner's argument is premised on the fact that if he were given separate trials in the present case, he would have chosen not to testify with regard to Counts III and IV. Assuming petitioner would have used the same tactics in separate trials as he used in the combined trial, it is not at all clear that he would have chosen to remain off the stand when tried separately on Counts III and IV. To illustrate, if petitioner were tried separately on Count III, the crimes charged in Counts I, II, and IV would still be relevant to establishing his guilt of the closely related crime charged in Count III. These other crimes would be before the jury, and presumably, the defendant would be just as eager to explain his noninvolvement in Counts I and II in the separate trial as he was in the combined trial. Of course, if defendant took the stand in the separate trial of Count III or IV and testified to his noninvolvement in Counts I and II exclusively, we would be back to the same issue we have in the present case, assuming the prosecution

were to comment upon his failure to discuss the crime charged in Count III. Similarly, if petitioner received a separate trial on Count I or II (and assuming petitioner took the stand as he did here to give an alibi), the offenses contained in Counts III and IV would be relevant as collateral robberies to show a common scheme or plan. They would be within the scope of cross-examination, and comment upon petitioner's failure to deny or explain them would be proper.

It is submitted that the prosecution has not injured petitioner by joining the four charges of robbery for trial in a single accusatory pleading.

II. Assuming a Violation of the Griffin Rule as to Counts III and IV, the Error Was Harmless Beyond a Reasonable Doubt

This Court in *Chapman* v. *California,* 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed.2d 705 (1967), in considering a violation of the *Griffin* rule held that not all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Rather, "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

Two considerations are important in considering the issue of harmless error in this case. The comment in this case was not extensive as was the situation presented to the court in *Chapman.* (See also *Anderson* v. *Nelson,* --- U.S. ---, 36 L. Week 3381, 4/2/68; *Fontaine* v. *California,* --- U.S. ---, 36 L. Week 3389

(4/8/68).) The comment in this case certainly did not approach "the machinegun repetition" that existed in *Chapman*. Counsel for petitioner points to two instances where comment was made by the prosecution. The first is at line 13, page 457, to line 1, page 458, which relates to an attempted explanation by the prosecutor as to his arguments being limited by the scope of cross-examination. The second comment cited by counsel for petitioner at line 1, page 461, to line 17, page 462, deals in part with petitioner's failure to deny or explain evidence against him.[8]

Secondly, the inquiry as to harmless error must be considered in light of the fact that petitioner here, unlike the *Chapman* case, took the stand in his own behalf. It was petitioner who focused the jury's attention on his failure to deny or explain the evidence against him. As a result the jury, without any aid from the prosecutor or the court, would be more aware of the petitioner's failure to deny or explain relevant evidence against him. Furthermore, the unexplained evidence against the petitioner was clearly within his personal knowledge. The jury would therefore inevitably look to the petitioner for an explanation of the innuendo of this evidence, especially since he was on the stand discussing other aspects of the case. As Justice Harlan stated in his dissent in *Chapman* at 386 U.S. 55, the added impact of comment in this

[8] An additional brief comment was made at lines 3 to 5, RT 464.

situation would seem marginal at most. Moreover, the presence of the petitioner on the stand removed any possibility that the jury might be misled concerning the reasons why the defendant had refused to testify. This has been cited as one of the most prejudicial aspects of comment upon the failure to testify. *Johnson* v. *New Jersey,* 384 U.S. 719, 729 (1966).

Applying the above principles and considerations to the present case, and considering them in light of the general statements of the court in *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966), that a violation of the no-comment rule does not affect the integrity of the fact finding process and creates no clear danger of convicting the innocent, the assumed violation of the *Griffin* rule was harmless beyond a reasonable doubt. The record here contains substantial, though circumstantial, evidence to support the jury's finding of guilt on Counts III and IV. The limited comment present in this case, together with the court's limiting instruction on the subject, when considered with the factor of the jury's independent analysis of the petitioner's failure in his testimony to explain incriminating circumstances, did not tip the scales against petitioner. The record supports the conclusion that any *Griffin* error was harmless beyond a reasonable doubt.

CONCLUSION

It is respectfully submitted that the judgment of the state court should be affirmed.

Respectfully submitted,

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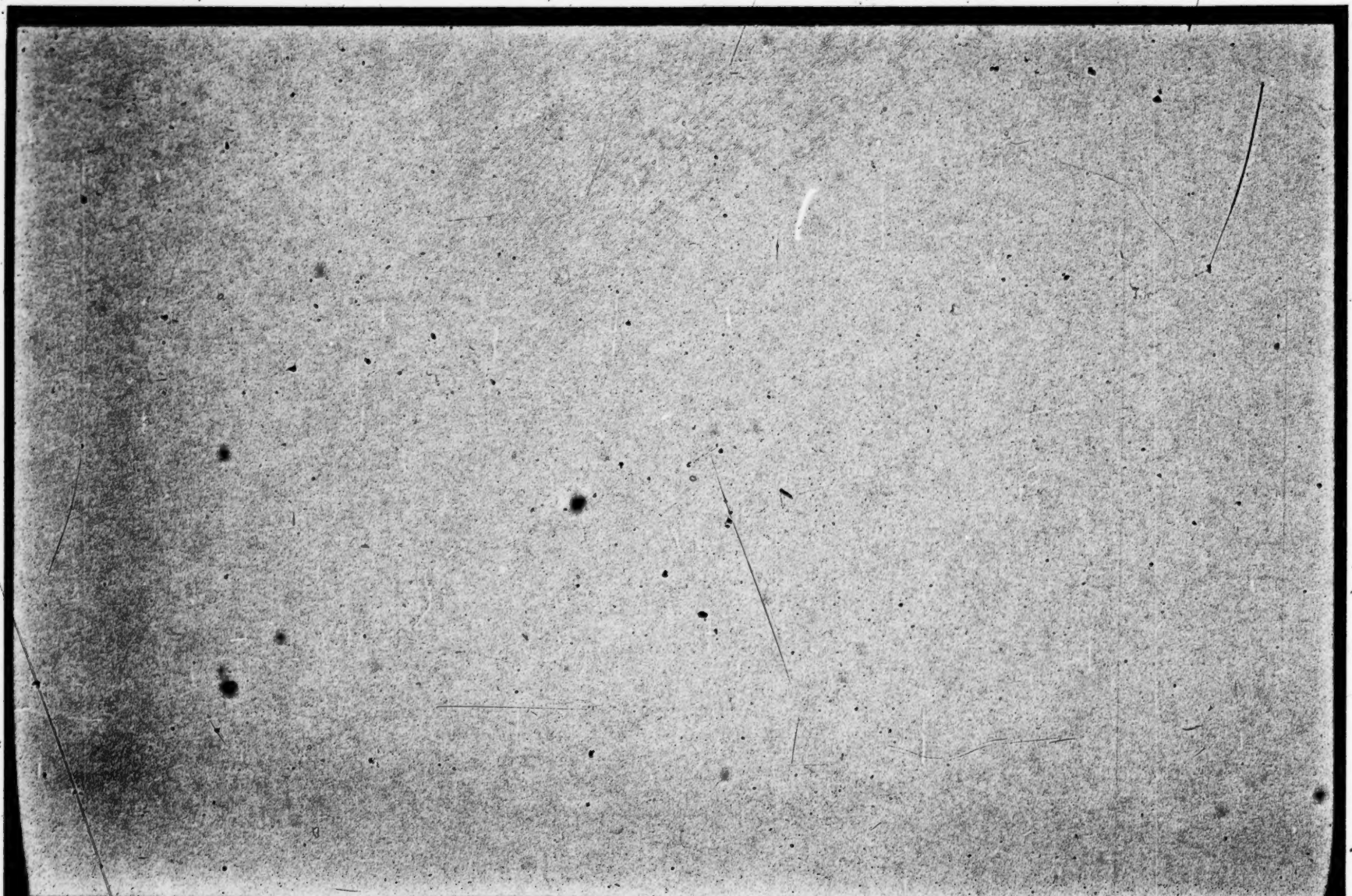

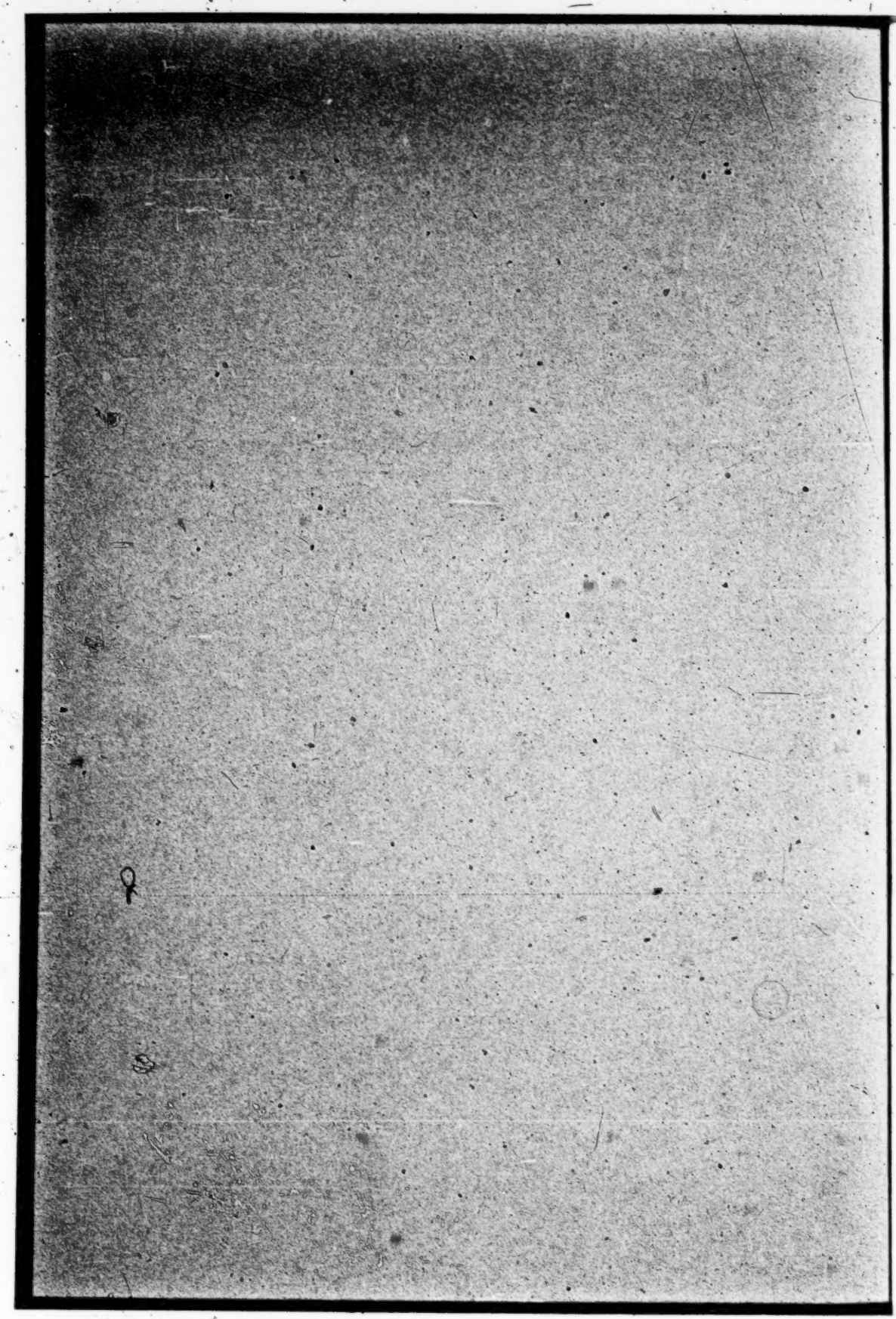

APPENDIX A

SECTION 1323

Defendant; exemption from compulsion; scope of cross-examination; comment on failure to explain or deny adverse evidence or facts

A defendant in a criminal action or proceeding can not be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. The failure of the defendant to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by counsel. (Enacted 1872. As amended Code Am.1873–74, c. 614, p. 451, § 79; Stats.1935, c. 718, p. 1942, § 3.)

APPENDIX B

[1] The instruction read: "It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

People v. *Perez,* 65 Cal.2d 615, 620, fn. 1.

APPENDIX C

SEC. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicides when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. [Constitution of 1849, Art. I, Sec. 8, revised 1879; amended November 6, 1934]

California Constitution, Article 1, Section 13

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